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SPECIAL SESSION PREVIEW: JUNE 1983

Gov. Mark White has called a special session of the 68th Legislature to begin at 10 a.m. Wednesday, June 22. This report discusses the rules and procedures for special sessions and outlines the history of the two issues that gave rise to the call--continuation of the Texas Employment Commission and the state's brucellosis-control programs.

Ernestine Glossbrenner
Chair

RULES AND PROCEDURES

Special sessions of the Legislature are governed by most of the constitutional and legislative rules that apply to regular sessions. In addition, there are rules that apply only to special sessions.

The Governor's Call

The Legislature may meet in special session only when called into session by the Governor. Art. 4, Sec. 8, of the Constitution gives the Governor the power to call special session "on extraordinary occasions." The Governor's proclamation calling the session (the "call")"shall state specifically the purpose for which the Legislature is convened." As of this writing, Gov. White had not filed his proclamation for the special session.

Art. 3, Sec. 40, says that the Legislature cannot meet in special session for more than 30 days. (This means calendar days, not "legislative" days, so a session that begins on June 22 must end by July 21.) This section also says that "there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to [the Legislature] by the Governor." The Governor may expand the call to include additional topics. If the session does not produce the results desired by the Governor, he may call additional sessions. Back-to-back sessions are possible.

Special Session Subjects

Bills

The Governor's call must set forth only the "purpose of the session." The courts have held that the Governor need not "state the details of legislation..." (Ex parte Fulton, 215 S.W. 331). In an 1886 case, the Texas Supreme Court ruled that the "subject" of a special session called to reduce taxes was in fact "the whole subject of taxation," so that a bill raising taxes could be considered (Baldwin v. State, 3. S.W. 109).

Under current judicial practice, courts would decline to investigate whether a law passed during a special session had been properly considered by the Legislature. Under the "enrolled bill doctrine," the courts do not hear questions of whether a bill that passed both Houses and was signed by the Governor complied with the procedural rules set by the Constitution. (City of Houston v. Allred, 71 S. W. 2d 251; Maldonado v. State, 473 W.W. 2d 26).

The Sec. 40 limit on subject matter may be enforced in two ways. A point of order may be raised against any bill that a legislator feels is not within the scope of the call. And the Governor may veto any bill.

According to the "Explanatory Notes" in the annotated edition of the House Rules (page 118):

> In order to abide by the spirit of this section [Art. 3, Sec. 40] it becomes imperative that a presiding officer, as well as individual legislators, strictly construe this provision. The rule should be rigidly adhered to in special sessions of the legislature, and points of order raised against bills on the ground that they do not come within the purview of the governor's call or have not been specially submitted, should be uniformly sustained, where it clearly appears that the bill is subject to objection.

The limitation on subject matter is subject to interpretation by the presiding officer of each house. In one ruling cited by the annotated rules, (page 219), Speaker Waggoner Carr ruled that "it was not the intention of this section to require the Governor to define with precision as to detail the subject of legislation, but only in a general way, by his call, to confine the business to the particular subjects... It is not necessary nor proper for the Governor to suggest in detail the legislation desired. It is for the Legislature to determine what the legislation shall be."

Carr ruled that amendments to a bill under consideration did not have to be weighed against the standard set by Sec. 40. As long as the amendment was germane to the bill, and the bill itself was within the subject of the call, the amendment would be permissible

The annotations state that the Speaker should review all bills filed with the Chief Clerk, and admit to first reading only those that he determines are within the subjects of the call.

Resolutions

House Rule 11, Sec. 8 states that "the subject matter of house resolutions and concurrent resolutions does not have to be submitted by the governor in a called session before they can be considered." This rules follows an Attorney General's opinion (No. M-309 (1968)).

Until 1972, constitutional amendments could not be proposed during a special session. In that year the voters approved an amendment to Art. 17, Sec. 1, allowing constitutional amendments to be considered "at any special session when the matter is included within the purposes for which the session is convened."

Proposed constitutional amendments may thus be considered in a special session only if they are within the Governor's call. The precedents discussed above for interpreting what is encompassed in the call apply to resolutions. But there is one significant difference. The Governor does not have the power to veto proposed constitutional amendments. (See Attorney General's Opinion M-1167 (1972), which cites an earlier opinion (To Honorable F.O. Fuller, Feb. 13, 1917).) Therefore, it is up to the Legislature to decide whether a proposed constitutional amendment is within the scope of the special session.

Time Limits

Art. 3, Sec. 39, of the Constitution sets the effective date of all laws at 90 days following the adjournment of the session at which they were enacted. This applies to special sessions as well as to regular sessions. The Legislature may override this rule by a vote of two thirds of the membership of each house.

Other Rules and Procedures

Bills may be prefiled 30 days before the start of the special session.

The Comptroller is required by Art. 3, Sec. 49a, of the Constitution to submit a supplemental revenue estimate to the Legislature prior to the start of the special session.

The House Business Office said House members would receive an additional $33 for office expenses for each day of the special session, a pro rata share of the additional $1,000 a month allowed by the House rules for each month the Legislature is in session.

Previous Special Sessions

The 67th Legislature was called into special session by Gov. William Clements three times. The first session, July 13-Aug. 11, 1981, was originally called on five subjects: repeal of the ad valorem tax, creation of a water trust fund, congressional redistricting, revision of the property tax code, and the Medical Practice Act. The call later was opened to include additional subjects and the House considered 15 bills and five proposed constitutional amendments.

The second called session, May 24-May 28, 1982, was called originally to deal with the state property tax and college funding, but was eventually opened to other issues.

The third called session, Sept 7-9, 1982, dealt with the Texas Employment Commission trust fund and one other bill.

SPECIAL SESSION ISSUES

The Governor has said that he would include in his special-session call the continuation of the Texas Employment Commission and brucellosis control. He indicated that once these issues were settled, other issues might be included in the call.

The Texas Employment Commission

The 68th Legislature adjourned its regular session on May 30 without having passed a bill continuing the statutory authorization for the Texas Employment Commission. If no such bill is passed before Sept. 1, 1983, the commission will begin a one-year phase-out and cease to exist Sept. 1, 1984, under the Texas sunset law.

HB 885, by Criss, a bill continuing the TEC in essentially its present form, died in the closing days of the session after the House refused to accept a Senate amendment to the bill. The amendment, by Sen. Lloyd Doggett, would have created a Human Rights Department within the TEC.

As passed by the House in a non-record vote on April 21, HB 885 would have continued the TEC with some relatively minor alterations. A system of annual performance evaluations would have been initiated to determine merit pay increases. The bill also would have required the naming of an agency administrator to handle daily personnel decisions, whereas now the chair of the of the commission has statutory authority as executive director. The bill also added new grounds for impeachment of a commissioner--absence from commission meetings for 60 days and inability to discharge duties because of illness or other disability. (See HSG Daily Floor Report, April 20, 1983 for the analysis of HB 885).

The bill reflected most of the recommendations of the Sunset Commission staff and the Governor's Task Force on Jobs and the Unemployment Trust Fund, which had contracted with Arthur Andersen and Co. and the Texas Research League to study the TEC.

One recommendation of the Sunset Commission staff and the task force consultants that was not incorporated in the bill was that the three full-time commissioners become part-time and give up their role in hearing appeals of decisions on unemployment benefit claims. The appeals would have been heard by administrative law judges.

After passing the House, the TEC sunset bill went to the Senate State Affairs Committee, which reported it out on May 26 with a committee substitute by Sen. Doggett. In re-creating the TEC, the Doggett substitute was virtually the same as the House bill, although it required more information in the TEC annual report and added conflict-of-interest provisions to the section on impeachment of commissioners.

However, the substitute contained new provisions that would have created within TEC a Human Rights Department to investigate employment-discrimination complaints. This part of the substitute bill was similar to SB 605, a bill passed by the Senate on March 24. SB 605, which would have created a separate Human Rights Commission, not attached to any existing agency, was never considered by the House.

On May 27, the Senate, by a vote of 16 to 14, tabled an amendment by Sen. Bob McFarland to eliminate the Human Rights Department provisions from the Doggett substitute. The bill was then passed on second reading by 25 to 5 and on third reading by voice vote.

On the same day, the House, in a non-record vote, refused to concur with the Senate amendment, requested a conference committee, and appointed conferees. The Senate did not name conferees, but on May 28 by voice vote it passed SR 541, allowing any conference committee on HB 885 to place the Department of Human Rights under the Texas Department of Labor and Standards or other "appropriate agency." On May 30, the House considered a similar resolution, HR 541. A two-thirds vote was required to take up the resolution during the final 72 hours of the session, and the motion to consider HR 541 failed after receiving only a majority, 77 to 63. The Senate refused to name conferees unless the resolution were passed, and the regular session ended with no further action on HB 885.

HB 2, pre-filed by Reps. Criss and Leonard for the special session, is the same as the Senate version of the TEC provisions in HB 885, without the Human Rights Department. Sens. Blake and Sharp were to pre-file a Senate companion measure. The Committee on Labor and Employment Practices set a hearing on TEC for 2 p.m. Wednesday, June 22.

Rep. Criss, while saying he did not oppose a separate human rights agency, opposed the Doggett amendment. Business and labor had worked out a compromise on the TEC re-authorization with the agreement that no substantive changes would be accepted. There was concern that having TEC investigate job discrimination complaints against employers would hurt its relationship with those employers in placing job applicants. Finally, Rep. Criss said he was concerned that federal funding for the TEC might

be cut if it were not considered a full-time employment agency by the federal government, once TEC assumed other responsibilities. Supporters of the amendment responded that since SB 605, the bill creating a separate human rights agency, had been placed on the House calendar too late to permit its passage, the TEC re-authorization was the only vehicle left to create such an agency. They said placing a human rights department within the TEC would have little or no impact on federal funding as long as no federal employment agency funds were used for the equal-opportunity enforcement function.

Effects of failure to continue TEC

Federal law requires each state to have a state employment agency. While the Texas Employment Commission receives most of its funding from the federal government, the state must authorize the agency.

All employers are subject to two annual taxes on the first $7,000 of each employee's wages. The state tax rate, which varies among employers, is based upon the past unemployment claims by former employees of that employer. The state tax is used to fund unemployment benefits. A federal tax is used to fund administration of job-finding services by the state employment agencies. The federal employer tax is 3.5 percent per year on each employee's wages up to $7,000 ($245). However, if the state employment agency is in full compliance with federal requirements, all state employers receive a credit of 2.7 percent and pay an actual rate of 0.8 percent ($56).

The effect of a possible sunset of the TEC is unclear. Statements about impending tax increases, made by officials in the U.S. Department of Labor's Dallas regional office, were later repudiated as "premature" and "inappropriate" by the U.S. Labor Department in Washington, D.C., which has offered no further opinion on the impact of eliminating the TEC.

Under a "worst case" scenario, the federal tax credit would cease as of Jan. 1, 1984, and Texas employers would face additional taxes of more than $1 billion. The rationale for this thinking is that since TEC would cease to exist (after its phase-out) before the coming federal fiscal year ends, on Sept. 30, 1984, Texas' certification for that year might be withdrawn this Oct. 31, the certification date.

However, the federal government could wait until Oct. 31, 1984, after TEC had actually been phased out, to declare Texas in non-compliance, delaying the tax increase until Jan. 1, 1985.

If Texas loses the tax credit, and employer taxes rise to the maximum, none of the money would return to the state, since it is earmarked for use by a state employment agency. There apparently is no explicit federal provision permitting the federal government to assume the functions of a state agency. The federal government might be able to act administratively to distribute unemployment benefits, or a special act of Congress could be passed to allow the Department of Labor to assume temporary employment-agency duties in Texas.

Equal-employment opportunity issues

Under Title VII of the federal Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, and the Age Discrimination in Employment Act of 1967, employers, employment agencies, job-training programs, and labor organizations may not discriminate on the basis of race, color, religion, sex, national origin or age. The federal Equal Employment Opportunity Commission (EEOC) investigates complaints and seeks settlements or files suits in court to stop discriminatory practices.

If a state or local law prohibits employment discrimination and a state or local agency has authority comparable to the EEOC, the federal agency must defer to the state or local agency and give them first opportunity to act.

Texas has no state equal-employment agency. The federal EOC retains authority, except in Austin, Corpus Christi and Fort Worth, which have their own federally approved equal-employment agencies. A Wichita Falls agency probably will be approved soon. The Houston and Dallas regional offices of the EEOC heard about 8,200 Texas cases in 1982. An additional 230 cases were heard by the Fort Worth agency and the Austin and Corpus Christi agencies heard about 100 each.

VACS arts. 6252-14 and 6252-16 prohibit employment discrimination by agencies of the state or political subdivisions and provide civil and criminal penalties. Federal courts have determined that in employment-discrimination actions against state and local governments, local prosecutors have 60 days to act before federal action is undertaken. State agencies that receive federal contracts or grants must have acceptable affirmative-action plans. The Governor's Office of Equal Opportunity monitors state agency equal-opportunity compliance and collects data but does not qualify for deferral of complaints by the EEOC.

The House has passed several bills to create state or local equal-employment agencies, but all these have died in the Senate. In 1977, the House, by 75 to 63, passed HB 1228, by Ragsdale, to create a state agency to investigate employment discrimination complaints. In 1979, the House voted 91 to 41 to pass HB 1052, by Cary, to create a State Commission on Human Rights to investigate

discriminatory practices concerning employment, housing and public accomodations, and to promote creation of local agencies. In 1981, the House by non-record vote passed HB 586, by Cary, authorizing local human rights commissions to investigate all types of discriminatory practices and allowing complaints to be filed in state district court in those areas without local commissions.

During the 68th Legislature, the Senate on March 24 passed by voice vote (Leedom recorded no) SB 605, to create a nine-member Texas Commission on Human Rights and to prohibit employment discrimination. As with the federal EEOC, individuals could file complaints, and the state commission would investigate and attempt to settle the complaint through conciliation. The commission also could seek injunctive relief in district court to stop discriminatory practices and could seek affirmative action such as hiring or reinstatement with back pay. Political subdivisions, including counties, would be granted explicit authority to create local commissions by ordinance. Action on local cases would be deferred to the local commission.

SB 605 was reported without amendment by the House State Affairs Committee on May 12, by a vote of 8 ayes, 2 nays, 2 present, not voting. The bill was placed on the General State Calendar on May 27 but was not considered. The Doggett amendment to the TEC bill (HB 885) was essentially the same as SB 605 as it was passed by the Senate and the House State Affairs Committee, except that it created a Department of Human Rights within the TEC rather than a separate commission. It also made state and local government agencies potentially liable for attorneys' fees as part of any conciliation agreement or judicial remedy.

The EEOC provides federal funding to state or local agencies to which it defers local equal-employment complaints. Should a state or local agency qualify, it receives for its first year of operation $375 for each case resolved during the federal fiscal year. (This first-year sum will increase to $400 on Oct. 1.) If all standards are met, the EEOC provides extra money in subsequent years for processing charges. The current total per-case maximum payment is $412.50 per resolved charge, which will increase to $426 per charge on Oct. 1. The state or local government funds the agency during the fiscal year and is reimbursed by the federal government at the end of the fiscal year. The Legislative Budget Office estimated that if a Texas agency fully qualified for EEOC funds, the state would still need to appropriate $1.247 million for the first biennium of operation, but that by fiscal 1986, the federal money would cover all but $74,147 in annual costs.

Texas Employment Commission officials have voiced some concerns with placing an equal-employment department in the TEC. The federal government strictly limits use of federal funds earmarked for state employment agencies to administration of job placement and related research and distribution of unemployment benefits. Thus, TEC officials say, any equal-employment department would have to be completely separate, funded solely from EEOC and state money. Otherwise, Texas employers might face a tax penalty. Also, since TEC commissioners would have to strictly separate time spent on unemployment business and that spent on equal-employment business, the commission could lose part of the federal funds used to pay their salaries. Presumably any shortfall would have to be made up by state funds.

Brucellosis Control

Brucellosis, also called Bang's disease, is an infectious disease that affects the reproductive organs of cattle. It can cause cows to abort fetuses or give birth to weak calves and can cause sterility in bulls. It also reduces cows' milk production. Unchecked, the disease poses an economic threat to the cattle industry, particularly the breeding and dairy industry. It is not, however, a significant public health problem; while people who work with infected animals occasionally become ill, the meat from infected cattle does not pose any hazard to humans.

Since 1956, Texas has participated in the U.S. Department of Agriculture (USDA) brucellosis-control program. The Texas Animal Health Commission (TAHC) is responsible for implementing the federal program, and for enforcing the state brucellosis-control law (Texas Agriculture Code, Chapter 163). The federal program encourages ranchers to vaccinate their cattle against brucellosis by reimbursing ranchers for vaccine and veterinarians' fees. The state pays part of the cost of vaccination. The federal program also requires that cattle be tested for brucellosis at public market. Infected cows are slaughtered, and the herds they came from tested to identify other infected cattle. A test-and-slaughter procedure is continued until the suspect herd is deemed free of brucellosis. The federal government pays an indemnity for any cattle slaughtered.

Texas' brucellosis-control law has not been significantly revised since it was enacted in 1959, and TAHC officials say much of it is out-of-state. The law specifies, for example, that TAHC use certain diagnostic tests that are no longer the most current. Further, according to TAHC, the brucellosis-control procedures required by the statute do not comply with federal regulations. State law says, for example, vaccinated females under 30 months old need not be tested. The federal government requires testing of vaccinated females older than 18 months. If a state program does not meet federal standards, the federal government can restrain interstate and international shipment of Texas cattle. Texas is the only state currently out of compliance.

TAHC has attempted to enforce federal regulations through it rulemaking power. But the commission's rules have twice been successfully challenged in court. In 1979, a state district court enjoined the commission's enforcement of its rules against South Texas rancher R.J. "Red" Nunley on the grounds that the rules would irreparably damage Nunley's business. The commission revised its rules and again attempted to enforce them, but in June, 1982, a Travis County district judge ruled that the TAHC rules exceeded the commission's statutory authority and were therefore unconstitutional. The state has appealed the case, which was initiated by Nunley and others.

TAHC sought legislative relief during the 68th Legislature's regular session. HB 701 by Rep. Bruce Gibson would have granted the commission the necessary rulemaking authority to enforce federal standards and avoid a threatened federal quarantine of Texas cattle. (The HSG analysis of HB 701 appeared in the April 11 Daily Floor Report.) The bill passed the House by a third-reading vote of 88 to 42 on April 26, but failed to pass third reading in the Senate by a vote of 10 to 18.

When HB 701 failed, the U.S. Department of Agriculture moved to impose an emergency quarantine on Texas cattle. The quarantine was to become effective June 1, but on May 31, a federal judge in Austin granted a request by Attorney General Jim Mattox for a temporary restraining order against imposition of the quarantine. The USDA then decided to use its regular procedure for imposing a quarantine, which involves first allowing a period of public comment on the proposed quarantine. This period will end July 25, and a quarantine in Texas could take effect after that date.

A quarantine does not mean that cattle cannot leave the state. It does mean that cattle shipped out of the state are subject to more stringent brucellosis-testing requirements. Breeding cattle shipped during a quarantine must come from a "qualified herd," one that has been found brucellosis-free in two consecutive tests 120 days apart. Each cow shipped must also have had a negative test within the 30 days prior to shipment. Under non-quarantine conditions, breeding cattle from the western part of the state must have only the negative test within 30 days prior to shipment. Unvaccinated cattle from east and south-east Texas, where brucellosis is more common, must have two negative tests before shipment; vaccinated cattle need only one. Breeding cattle from any "certified free herd" need no testing prior to shipment under non-quarantine conditions. A certified free herd is one that tests free of brucellosis once a year.

The Texas Agricultural Extension Service at Texas A&M University has estimated that a quarantine could cost the Texas cattle industry $130 million. Texas cattle raisers currently ship about two million head of cattle out-of-state each year.

TAHC officials say that the states of Illinois, Idaho, North Dakota, Montana, Alabama, Pennsylvania, Tennessee, Nebraska, Minnesota, California, South Dakota, and Ohio are restricting shipment of cattle from Texas, or plan to restrict it if the state does not comply with federal regulations. However, former Land Commissioner Bob Armstrong, a consultant to the Texas Department of Agriculture on the brucellosis issue, says the USDA solicited the embargo threats from other states to support its own position on the quarantine.

Those who support broader rulemaking authority for TAHC say a quarantine would devastate the industry. The purebred-cattle raisers would be hardest hit, but the quarantine would affect other ranchers too. In West Texas, where drought is common, ranchers often take cattle to neighboring states to graze. A quarantine would impede this practice, and thus force ranchers to slaughter and sell cattle in Texas at lower prices. Supporters say that for the good of the state's cattle industry, ranchers have to live with state and federal regulation. Texas cannot expect to be exempt from rules designed to protect cattle in all 50 states.

Critics of TAHC and USDA oppose giving a state agency the broad regulatory authority HB 701 proposed. They favor controlling brucellosis through voluntary vaccination of cattle. Many ranchers cannot afford to round up their cattle every time TAHC wants to test them, critics say. If the cattle are vaccinated, that should be enough. Only if a rancher refuses to vaccinate a herd is the test-and-slaughter procedure justified, they argue. Opponents particularly object to TAHC rules that divide the state into two areas, based on the incidence of brucellosis. They say these rules unreasonably restrict the movement of cattle within the state, to the detriment of many ranchers.

Opponents also complain that the test-and-slaughter method of brucellosis control can result in unnecessary slaughter of animals. A vaccinated cow will sometimes test positive <u>because</u> of the vaccine. USDA officials say, however, that these false positives are relatively rare, and that ranchers have the option of slaughtering the animal or waiting for the results of more sensitive diagnostic tests. Slaughter of a vaccinated animal on the basis of a positive field test is always the decision of the owner, officials say.